

## **PROPRIETARY AGREEMENT**

### **FOR USE OF THE**

### **ALTERNATING GRADIENT SYNCHROTRON ("AGS")**

### **As part of the RELATIVISTIC HEAVY ION COLLIDER ("RHIC") Complex**

### **A DOE DESIGNATED USER FACILITY**

This Agreement is entered into by

BROOKHAVEN SCIENCE ASSOCIATES, ("Contractor"),

which operates Brookhaven National Laboratory ("Brookhaven"), Upton, New York 11973, under Contract No. DE-AC02-98CH10886 ("Prime Contract") with the United States Government as represented by the U.S. Department of Energy ("DOE"),

and Input Institution Name("User")

(Collectively, "the Parties")

#### **ARTICLE I: SCOPE OF SERVICES**

CONTRACTOR will make available to USER certain facilities, equipment, services, information and other material as set forth in this agreement.

Under the terms of this Agreement, the USER will be granted access to and use of the facility for the conduct of proprietary research, which research must first receive programmatic approval of the facility director and available scheduling therefor. It is understood and agreed that the approval determinations of the director of the facility are final.

It is understood that to receive such approval, the USER is obligated to provide a proposal disclosing a functional non-proprietary description of the experimental work, since such information is essential to the CONTRACTOR to operate the facility. Any proposal for proprietary research submitted to the CONTRACTOR which is not approved for performance at the facility shall be returned to the USER and the CONTRACTOR and DOE shall obtain no rights in such proposal.

#### **ARTICLE II. TERM OF THE AGREEMENT**

This Agreement shall become effective when signed by the parties hereto and shall continue as long as representatives from User are conducting research at the facility, unless sooner terminated upon written notice by either party.

#### **ARTICLE III: COST**

USER will bear its own costs and expenses associated with this Agreement. USER shall also be responsible for a fee for the use of the facility for proprietary work, which fee represents full cost recovery by the CONTRACTOR. Appendix A attached hereto sets forth the basic pricing policy applicable to proprietary users of the facility. The USER shall make a payment of the full amount to cover the CONTRACTOR'S costs incurred in the performance of the work under this Agreement if the estimated cost is \$25,000 or less OR for work that will be completed in 90 days or less. For estimated costs greater than \$25,000 and that will last longer than 90 days, sufficient advance funds shall be obtained to maintain approximately a 90-day advance of funds during the life of the project. The advance shall also cover any anticipated termination cost that the CONTRACTOR would incur if this agreement is terminated.

The CONTRACTOR must receive full payment or the advance prior to commencement of work. Upon completion of work, or upon termination of this agreement, the CONTRACTOR shall promptly return to the Sponsor any portion of the payment that is unexpended.

The CONTRACTOR has no obligation to make available to USER certain facilities, equipment, services, information and other material as set forth in this agreement or continue performance of the work at a cost in excess of any payment or advance received.

#### **ARTICLE IV: ADMISSION REQUIREMENTS**

- A. General** - USERS are subject to the administrative and technical supervision and control of CONTRACTOR; and will comply with all applicable rules of CONTRACTOR and DOE with regard to admission to and use of the facility, including safety, operating and health-physics procedures, environment protection, access to information, hours of work, and conduct. USER is required to obtain agreements from each of the employees or representatives as necessary to implement the provisions of the Agreement. USER's employees will not be considered employees of CONTRACTOR for any purpose.
- B. Safety and Health** - USER shall take all reasonable precautions with regard to the installation of equipment and performance of experiments to protect the safety and health of others and to protect the environment, and shall comply with all applicable safety and health regulations and requirements of the facility, the CONTRACTOR, and the Government. If USER fails to comply with said regulations or requirements, the CONTRACTOR may, without prejudice to any other legal or contractual rights, issue an order stopping all or any part of USER's activities at the facility.
- C. ISMS** - CONTRACTOR's Integrated Safety Management System ("ISMS") must be used by all Laboratory Staff and Users to establish work planning and control requirements at CONTRACTOR so that all work is planned and implemented properly, hazards and risks are identified and controlled, resources are scheduled and coordinated, and appropriate feedback mechanisms are in place. "Work" is defined as the activities that involve the design, conduct and completion of experiments by Brookhaven Staff or Users. The Work Planning and Control Management System includes the Environmental Safety and Health ("ESH") Standard 1.3.5, Planning and Control of Experiments and ESH Standard 1.3.6, Work Planning and Control for Operations.
- D. Training** - CONTRACTOR has established training programs in accordance with regulatory requirements for work to be performed, hazards that may be encountered, areas to be accessed, potential for risk, and general site requirements. CONTRACTOR's Training and Qualifications Program ensures that Laboratory staff and USERS are trained and qualified to perform their assigned tasks and job functions.
- E.** Individuals for whom USER is responsible, but who are not actual employees of USER, shall execute any and all documents required by CONTRACTOR to access and use the facility.

#### **ARTICLE V: PROPERTY AND MATERIALS**

USER reserves the right to furnish equipment, tooling, test apparatus, or materials necessary to assist in the performance of its experiment(s) at the facility. Such items shall remain the property of USER. Unless the parties otherwise agree, all such property furnished by USER or equipment and test apparatus provided by USER will be removed by USER within sixty (60) days of termination of this Agreement or will be disposed of as directed by USER. Any equipment that becomes integrated into the facility shall be the property of the Government. USER acknowledges that any material supplied by USER may be damaged, consumed or lost. Materials (including residues and/or other contaminated material) remaining after performance of the work or analysis will be removed in their then condition by USER at USER's expense. USER will return facilities and equipment utilized in their original condition except for normal wear and tear.

CONTRACTOR shall have no responsibility for USER's property in CONTRACTOR's possession other than loss or damage caused by willful misconduct or gross negligence of CONTRACTOR or its employees.

Personal property produced or acquired during the course of this Agreement shall be disposed of as directed by the owner at the owner's expense.

#### **ARTICLE VI: SCHEDULING**

USER understands that CONTRACTOR will have sole responsibility and discretion for allocating and scheduling usage of the facilities and equipment needed for or involved in the Activity.

#### **ARTICLE VII: INTELLECTUAL PROPERTY PROVISIONS**

The rights of the parties in patents, Technical Data, copyrights and other intellectual property that may arise under this Agreement are set forth in Appendix B of this Agreement. Appendix B incorporates the provisions of the "Class Waiver for Proprietary Users of Energy Research Designated User Facilities" issued by DOE.

Individuals for whom USER is responsible, but who are not actual employees of USER, shall be considered employees of USER solely for the purposes of ownership of intellectual property in accordance with Appendix B.

The CONTRACTOR shall have the right to use, without payment of any compensation, any information delivered to the CONTRACTOR under the terms of this Agreement which is not marked as "proprietary data" of the USER pursuant to paragraph 3 of Appendix B of this Agreement.

#### **ARTICLE VIII: EXPORT CONTROLS**

USER acknowledges that the export of goods or Technical Data may require some form of export control license from the U.S. Government and that failure to obtain such export control license may result in criminal liability under the laws of the United States.

#### **ARTICLE IX: RECORDS AND ACCOUNTING SYSTEM**

USER will maintain records of receipts, expenditures, and the disposition of all Government property in its custody, related to the Agreement.

#### **ARTICLE X: PUBLICATIONS**

USER will not use the name of CONTRACTOR or the United States Government or their employees in any promotional activity, such as advertisements, with reference to any product or service resulting from this Agreement, without prior written approval of the Government and CONTRACTOR.

#### **ARTICLE XI: ADMINISTRATION OF THE AGREEMENT**

This Agreement is entered into by CONTRACTOR under the authority of its Prime Contract with DOE. CONTRACTOR will administer this Agreement in all respects. Administration of this Agreement may be transferred from CONTRACTOR to DOE or its designee with notice of such transfer to USER, and CONTRACTOR will have no further responsibilities except as set forth in Article XVI of this Agreement.

#### **ARTICLE XII: DISPUTES**

The parties will attempt to jointly resolve all disputes arising from this Agreement. If the parties are unable to jointly resolve a dispute within a reasonable period of time, the dispute will be decided by the DOE Contracting Officer. After the Contracting Officer's decision is made, either Party may request that the dispute be settled by arbitration in accordance with the then current and applicable rules of the American Arbitration Association. Judgment upon the award rendered by the Arbitrator(s) shall be nonbinding on the Parties, and any costs incurred therefrom shall be divided equally between the Parties.

#### **ARTICLE XIII. CONFLICT OF TERMS**

This agreement constitutes the primary document which governs the work described in the proposal. In the event of any conflict between the terms of this document and any other document issued by either party, the terms of this document shall prevail.

#### **ARTICLE XIV: INDEMNITY AND LIABILITY**

- A. Personnel Relationships** - USER shall be responsible for the acts or omissions of its employees and agents and of all other persons that USER allows to participate in the activities under this Agreement.

- B. Product Liability** - To the extent permitted by applicable law, if USER elects to retain title to an invention pursuant to the terms of this Agreement, then USER hereby agrees to hold harmless and indemnify CONTRACTOR and the United States Government, their officers, agents and employees from any and all liability, claims, damages, costs and expenses, including attorney fees, for injury to or death of persons, or damage to or destruction of property, as a result of or arising out of the making, using, or selling of a product, process or service which was derived from the work performed under this Agreement by or on behalf of USER, its assignees or licensees.
- C. General Liability** - To the extent permitted by applicable law, USER hereby agrees to indemnify and hold harmless CONTRACTOR and the United States Government, their officers, agents and employees from any and all liability, claims, damages, costs and expenses, including attorney fees, for injury to or death of persons, or damage to or destruction of property, to the extent such liability, claims, or damages is caused or contributed to by the intentional or negligent act or willful misconduct of USER or its employees or representatives during the performance of the work under this Agreement.
- D. General Disclaimer** - Except to the extent of their negligence or intentional misconduct, neither the Government nor the CONTRACTOR, nor persons acting on their behalf will be responsible for any injury to or death of persons or other living things or damage to or destruction of property or for any other loss, damage, or injury of any kind whatsoever resulting from the performance of services or furnishings of materials hereunder, unless provided otherwise by applicable law.

THE GOVERNMENT AND CONTRACTOR MAKE NO EXPRESS OR IMPLIED WARRANTY AS TO THE CONDITIONS OF THE RESEARCH OR ANY INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DEVELOPED UNDER THIS AGREEMENT, OR THE OWNERSHIP, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE RESEARCH OR RESULTING PRODUCT; THAT THE GOODS, SERVICES, MATERIALS, PRODUCTS, PROCESSES, INFORMATION, OR DATA TO BE FURNISHED HEREUNDER WILL ACCOMPLISH INTENDED RESULTS OR ARE SAFE FOR ANY PURPOSE INCLUDING THE INTENDED PURPOSE; OR THAT ANY OF THE ABOVE WILL NOT INTERFERE WITH PRIVATELY OWNED RIGHTS OF OTHERS. NEITHER THE GOVERNMENT NOR CONTRACTOR SHALL BE LIABLE FOR SPECIAL, CONSEQUENTIAL, OR INCIDENTAL DAMAGES ATTRIBUTED TO SUCH RESEARCH OR RESULTING PRODUCT, INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DELIVERED UNDER THIS AGREEMENT.

#### **ARTICLE XV: ENTIRE AGREEMENT**

It is expressly agreed by the parties hereto that this Agreement constitutes the entire and only contract between the parties with respect to the proprietary research to be conducted at the facility; that there are no agreements, understandings or covenants between the parties hereto of any kind, nature or description, express or implied, oral or otherwise which have not been set forth herein, and that this Agreement cannot be modified, altered, amended or changed, nor any provision thereof waived or abrogated, except by an instrument in writing and duly executed on behalf of each of the parties hereto by the duly authorized representatives or officers of each party who have been expressly authorized in writing to execute such an instrument.

#### **ARTICLE XVI: TERMINATION**

Either party may terminate this Agreement for any reason at any time by giving not less than thirty (30) days prior written notice to the other party. Notice will be deemed made as of the day of receipt. The obligations of any clause of this Agreement, which by their nature extend beyond its termination shall remain in full force and effect until fulfilled.

**ARTICLE XVII: APPROVAL**

This Agreement is subject to the approval of the United States Department of Energy.

BROOKHAVEN SCIENCE ASSOCIATES:

USER:

By \_\_\_\_\_  
(Signature)

By \_\_\_\_\_  
(Signature)

Name Lori-Anne Neiger  
Chief Intellectual Property Counsel  
Office of Intellectual Property

Name Input Name

Title and Sponsored Research

Title Input Title

Date \_\_\_\_\_

Date \_\_\_\_\_

Mailing Address of Institution:  
Input Address

## **APPENDIX A**

### **BROOKHAVEN NATIONAL LABORATORY FULL COST RECOVERY RATE**

- 1) Full Cost Recovery Rates are established at the beginning of each Fiscal Year (effective October 1) and are subject to revision to reflect changing cost factors during the Fiscal Year.
- 2) BSA will notify the User in writing at the beginning of each Fiscal Year and at any time during the Fiscal Year of any change in the full cost recovery rate for the facility.

## **Appendix B**

### **Patent Rights — User Facilities (Class Waiver)**

#### (a) Definitions

(1) “User” means the person or entity with which this agreement is made.

(2) “Subject Invention” means any invention or discovery of the User, conceived or first actually reduced to practice in the course of or under this agreement, and includes any art, method, process, machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, or any variety of plants, whether patented or unpatented under the Patent Laws of the United States of America or any foreign country.

(3) “Facility Operator” means the operating contractor which manages and operates the Government—owned, contractor—operated facility where the work under this agreement is to be performed.

(4) ,“Patent Counsel” means the DOE Patent Counsel assisting the Facility Operator.

#### (b) Rights of the User.

##### (1) Election to retain rights.

Subject to the provisions of paragraph (c)(2) of this clause, the User may retain the entire right, title and interest in any patent application filed in any country on a Subject Invention reported and elected in accordance with paragraph (d) of this clause and in any resulting patent secured by the User. Where appropriate, the filing of patent applications by the User is subject to DOE security regulations and requirements.

##### (2) Minimum license.

The User reserves an irrevocable, nonexclusive, paid—up license in each patent application filed in any country on a Subject Invention and any resulting patent In which the User does not elect to retain title or in which the Government acquires title. The license shall extend to the User’s domestic subsidiaries and affiliates, if any, within the corporate structure of which the User is a part and shall include the right to grant sublicensees of the same scope to the extent the User was legally obligated to do so at the time this agreement was entered into. The license shall be transferable only with approval of DOE except when transferred to the successor of that part of the User’s business to which the invention pertains.

#### c) Rights of Government.

##### (1) Assignment to the Government.

The User agrees to assign to the Government, upon request, the entire right, title, and interest in any country to each Subject Invention of the User except to the extent that rights are retained by the User under Paragraph (b)(2) of this clause, where the User:

- (i) Does not elect pursuant to this clause to retain such rights; or
- (ii) Fails to have a patent application filed in that country on the Subject Invention or decides not to continue prosecution or not to pay any maintenance fees covering the invention; or
- (iii) At any time, the User no longer desires to retain title.

(2) Terms and Conditions of Waived Rights.

(i) To preserve the Government's residual rights to Subject Inventions, the User shall take all actions in reporting, electing, filing on, prosecuting and maintaining invention rights promptly, but in any event, in sufficient time to satisfy domestic and foreign statutory and regulatory time requirements, or, if the User decides not to take appropriate steps to protect the invention rights, it shall notify DOE in sufficient time to permit the Government to file, prosecute and maintain patent applications and any resulting patents prior to the end of such domestic or foreign statutory or regulatory time requirements.

(ii) The User shall convey or assure the conveyance of any executed instruments necessary to vest in the Government the rights set forth in this clause.

(iii) The User hereby grants to the Government a nonexclusive, nontransferable, irrevocable, paid—up license to practice or have practiced each Subject Invention throughout the world for or on behalf of the United States.

(iv) The User shall provide the Government a copy of any application filed on a Subject Invention promptly after such application is filed, including its serial number and filing date.

(v) The User agrees that .with respect to any subject invention in which it has acquired title, DOE has the right to require the User, or an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the User, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that:

(A) Such action is necessary because the User or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(B) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the User, assignee, or their licensees; or

(C) Such action is necessary to meet requirements for public use specified by federal regulations and such requirements are not reasonably satisfied by the User, assignee, or licensees.

(vi) The User shall submit written reports at reasonable intervals upon request of the Government during the term of the patent on the Subject Invention regarding:

(A) The commercial use that is being made or is intended to be made of the invention; and

(B) The steps taken by the User or an assignee or exclusive licensee to bring the invention to the point of practical application or to make the invention available for licensing.

To the extent data or information supplied, under this section is considered by the User, its licensee or assignee to be privileged and confidential and is so marked, DOE agrees that, to the extent permitted by 35 U.S.C 202(c) (5), it will not disclose such information to persons outside the Government.

(d) Invention identification, disclosures, and reports.

(1) The User shall furnish the Patent Counsel a written report containing full and complete technical information concerning each Subject Invention of the User within. 6 months after conception or first actual reduction to practice, whichever occurs first, in the course of or under this contract, but in any event prior to any on sale, public use or public disclosure of such invention known to the User. The report shall identify the agreement and inventor and shall be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the invention pertains a clear understanding of the nature, purpose, operation, and to the extent known, the physical, chemical, biological, or electrical characteristics of the invention. The report should also include any election of patent rights under this clause. When an invention is reported under this paragraph '(d), it shall be presumed to have been made in the manner specified In Section (a)(1) and (2) of 42 U.S.C. § 5908.



(e) Limitation of rights.

Nothing contained in this patent rights clause shall be deemed to give the Government any rights with respect to any invention other than a Subject Invention except as set forth in the Facilities License of paragraph (f).

(f) Facilities License.

In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this agreement, the User agrees to and does hereby grant to the Government an irrevocable, nonexclusive paid—up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the User, which at any time through completion of this contract are owned or controlled by the User and are incorporated in the facility as a result of this agreement to such an extent that the facility is not restored to the condition existing prior to the agreement (1) to practice or to have practiced by or for the Government at the facility, and (2) to transfer such license with the transfer of that facility. The acceptance or exercise by the Government of the aforesaid rights and license shall not prevent the Government at anytime from contesting the enforceability, validity or scope of, or title to, any rights or patents herein licensed.